

Estate Planning, Your Family, and the Holidays

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As the end of the year approaches and many of us prepare to visit with our families of origin, or families of our choosing, it may be a perfect time to have a discussion about estate planning with your loved ones. Conversations about end-of-life choices can be difficult to coordinate during the year, but as you gather with those closest to you for the holidays, it could be a good time to make some group decisions. Here are a few issues you may want to discuss.

(1) Is this the year to get an estate plan set up?

The issue of setting up an estate plan can stay on the back burner for longer than many people are willing to admit. And while the topic can seem intimidating, having a complete and updated estate plan is ultimately an act of love for the people close to you. It can make things easier and reduce conflict during your incapacity and after you are gone. It can also reduce financial elder abuse and increase care options during the final years of your life.

Caution: If you (or your family members) decide to draft any of the documents on your own, please consult an attorney to review the drafts, ideally before the documents are finalized. Chances are that an experienced attorney will raise questions you may never have considered, which can save that extra expense and hassle down the road for you and your loved ones.

The crucial documents should include:

(A) Advance Health Care Directive -- This document is often the most important (and easiest to prepare) of all the documents. The reason: even if you own "nothing" (which is never really the case by the way), you are very likely going to need a health care directive at least once before you pass away. Moreover, this document deals directly with your care, and not just what other people will get when you pass away.

The health care directive is particularly important if your closest family is far away or deceased, if you have a partner that you are not married to (who should be involved in your

care), or if there are people related to you that you definitely do not want involved in health care decision-making. Also, keep in mind that this document also covers post-death authority such as disposition of remains (e.g., cremation, burial), organ donation, and funeral or memorial service preferences.

(B) Financial (Durable) Power of Attorney -- This document is possibly the second most important document in your estate plan, especially if you are over 60. The reason is the same as above: you are likely going to need this document at some point before you pass away. Also, if you are over 60, you really want to make sure your power of attorney gives enough powers to manage your long term care issues, such as the power to create irrevocable trust and the power to make gifts of property under certain circumstances during a period of your incapacity. Otherwise, your agent's hands could be tied, and your financial options for long term care could be unnecessarily limited in ways you would never have planned.

(C) Will and Revocable Living Trusts – Is a will sufficient, or would a revocable living trust (RLT) also make sense? Typically the main reasons to set up an RLT are to avoid a court-supervised probate proceeding (if this would even be a concern for you), or to create protections for others, whether it's money management, creditor protection (including from lawsuits and divorces), or estate tax protection. Also, please bear in mind that the need for protections can vary over time as people's lives change, so make sure to review your documents with an experienced estate planning attorney at least every 3-5 years as discussed below.

(2) Is the estate plan up to date?

Whether it's your own estate plan, or those of your parents, siblings, children, or other loved ones, the end of the year is a great time to be considering whether the estate plan is up to date. We suggest reviewing your documents with an experienced estate planning attorney at least every 3-5 years, just to make sure you did not miss any important tax or law changes, and that your documents properly address the new issues that have arisen in your own life as well. Don't forget to also review your beneficiary designations for life insurance, retirement accounts, and annuities, and make sure they are up to date as well. If you have questions about the beneficiary designations, make sure to discuss with your estate planning attorney, to make sure you're considering all the tax and creditor consequences of your choices.

(3) Have you (or your parents) sufficiently planned for current or future long term care?

Does this scenario sound familiar? One day you (or your parents) are happily planning for retirement and new adventures, then the next day you're wondering about what happens if you or they suddenly (or gradually) lose capacity.

Many of these concerns can be alleviated with an updated health care directive and power of attorney. However, you might be surprised at how little most powers of attorneys are set up to truly plan for long term care issues.

Some long term care planning is really about financial planning, where you make sure to plan and budget for the potential costs of long term care, whether in home or in a facility, and this planning can include long term care insurance policies. On the legal estate planning side, the main issues is ensuring your power of attorney and revocable living trust have sufficient gifting provisions and powers to create irrevocable trusts, just in case additional long-term care planning is needed during a period of incapacity, such as if Medi-Cal or Medicaid issue arise in the event residential skilled nursing care is needed, and to prevent or minimize Medi-Cal recovery claims after death. These issues can often be easily handled in advance, prior to incapacity. Caution: Not all estate planners have experience with elder law or Medi-Cal planning, so make sure to ask, and if needed get an appropriate referral.

(4) Did your parents (or others) want to leave things for you in an irrevocable trust?

Most estate plans provide outright to people, where people inherit directly in their own name. This option allows the greatest amount of flexibility and control for the beneficiary, but it also provides the greater exposure to potential claims, creditors, divorces, and lawsuits.

If you (or your parents) are considering a review of your estate planning, you (or they) might want to revisit the issue of whether to leave things to beneficiaries in trust, rather than outright. You might be surprised at how much protection and control you can give to your beneficiaries in an ongoing irrevocable trust, including the flexibility to have all the assets fully distributed if the ongoing trust becomes too much of a hassle. In fact, the level of protection you can leave to people in your estate planning is much greater than anything you could do to protect to protect your own assets in a similar situation. Your estate planning attorney should be able to assist with considering options.

We hope you enjoy the holiday season with your loved ones, and should any of these questions arise, feel free to reach out to us, or your estate planning attorney, for assistance.